Making a Record for Appellate Review

ROSS T. ROBERTS INN OF COURT
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Introduction

"[A]n appellate court will not convict a trial court of error on an issue which was not put before it to decide." *McDonald v. McDonald*, 946 S.W.2d 743, 747 (Mo. Ct. App. 1997).

An appellate court is a court of *error*. In order for the appellate court to find the trial court erred, the issue on appeal must have been properly before the trial court for a decision. If the trial court did not have the opportunity to decide the issue, the trial court cannot have erred.

The exception is "plain error" review, whereby the appellate court may, in its discretion, reverse the trial court on an issue "not raised or preserved, when the [appellate] court finds that manifest injustice or miscarriage of justice has resulted." Rule 84.13(c); *accord Cross v. Cleaver*, 142 F.3d 1059, 1067 (8th Cir. 1998); *see* Fed. R. Evid. 103(d).

Note: Some courts apply plain error review only in criminal cases. *Kafka v. Truck Ins. Exchange*, 19 F.3d 383, 385 (7th Cir. 1994) ("In civil cases, we have uniformly refused to allow a remedy under the 'plain error' doctrine.").

Pretrial Motions:
Preserving Legal Issues with a Summary Judgment Motion

Missouri:

"An order of summary judgment will not be set aside on review if supportable on any theory. Summary judgment is appropriate in the first instance only when no theory within the scope of the pleadings, depositions, admissions and affidavits filed would permit recovery and the moving party is entitled to judgment as a matter of law." *Zafft v. Eli Lilly & Co.*, 676 S.W.2d 241, 243-44 (Mo. 1984) (citation omitted); *accord Rocha v. Metropolitan Property and Cas. Ins. Co*., 14 S.W.3d 242, 245 (Mo. Ct. App. 2000) ("This court may affirm the [grant of summary judgment] if it finds that respondent was entitled to judgment as a matter of law for any reason appearing in the record.").

Pretrial Motions:
Preserving Legal Issues with a Summary Judgment Motion

Missouri:

However, "[R]eview of the grant of summary judgment is limited to those issues raised in the trial court, and this court will not review or convict a trial court of error on an issue that was not put before the trial court to decide." *United Missouri Bank, N.A. v. City of Grandview*, 105 S.W.3d 890, 895 (Mo. Ct. App. 2003) (internal quotation marks omitted).

Therefore, it is unclear in Missouri whether a legal issue not specifically raised in the trial court may be raised on appeal where the factual record before the trial and appellate court supports summary judgment based on that legal issue.

The safer practice is to raise all legal issues in the summary judgment motion.

Pretrial Motions:
Preserving Legal Issues with a Summary Judgment Motion

Federal:

"[L]egal issue[s] raised in [the] motion for summary judgment did not have to be reasserted in subsequent motions for directed verdict in order to be preserved for appeal." *Porous Media Corp. v. Pall Corp.*, 110 F.3d 1329, 1338 n. 12 (8th Cir. 1997).

Better practice: Reassert summary judgment grounds in trial and post-trial motions.

Motions in Limine

Missouri:

"The trial court's ruling on [a] motion in limine is interlocutory and subject to change during the course of the trial…. The motion in limine preserves nothing for review." *State v. Boulware*, 923 S.W.2d 402, 404-05 (Mo. Ct. App. 1996).

Motions in Limine

Federal:

"The Federal courts do not appear to agree on whether a pretrial motion is sufficient to preserve an objection for review." 75 Am.Jur.2d Trial § 57. "Federal Rule of Evidence 103(a) requires that a timely objection be made in order to preserve an issue for appeal. Rule 103(a), however, must be read in conjunction with Federal Rule of Civil Procedure 46[,] which states that formal exceptions are unnecessary." *Am. Home Assurance Co. v. Sunshine Supermarket, Inc.*, 753 F.2d 321, 324 (3d Cir. 1985) (citing cases showing circuit split over whether motion in limine preserves evidentiary objection for appeal).

Motions in Limine

The Eighth Circuit has said, “The denial of a motion in limine does not generally preserve error for appellate review. But there is an exception if the court made a definitive ruling on a fully briefed and argued motion which affected the entire course of the trial. In that limited circumstance the requirement for an objection would be more of a formality.” *Spencer v. Young*, 495 F.3d 945, 949 (8th Cir. 2007).

However, the Court has also recently said, “once a court has made a definitive ruling admitting or excluding evidence, either at or before trial, it is not necessary to renew an objection to preserve a claim of error for appeal.” *Olson v. Ford Motor Co.*, 481 F.3d 619, 629 n. 7 (8th Cir. 2007).

Motions in Limine

But see *Starr v. J. Hacker Co., Inc.*, 688 F.2d 78 (8th Cir. 1982).

Starr involved a strict liability claim for personal injury from a tool and die set. One defense: the duty to make the part safe rested on third parties. After a defense verdict, the plaintiff appealed.

"By a motion in limine made at the commencement of trial, Starr requested that defendants be prohibited from offering any evidence that it was the duty of some third party to make the die safe. The trial court overruled the motion, and the evidence was thereafter admitted without objection from Starr. Consequently, the error, if any, has not been preserved for review." 688 F.2d at 81.

So, what is a definitive ruling?

Voir Dire

Missouri:

Objections to jury strikes must preserve the factual record on which the objection is based. For example, an objection that a peremptory strike is racially discriminatory must preserve in the record the racial composition of the jury. *State v. Colbert*, 949 S.W.2d 932, 944 (Mo. Ct. App. 1997).

To preserve for appeal the denial of a request to strike a venireperson for cause, the request must be "clear," "definite," and "specific." *State v. McElroy*, 894 S.W.2d 180, 185 (Mo. Ct. App. 1995).

In *Ross v. Oklahoma*, 487 U.S. 81, 88-90, (1988) (5-4 decision), the Supreme Court held that a **State** may require a criminal defendant to exercise peremptory strikes where the trial court erroneously refused to strike for cause. "[W]e reject the notion that the loss of a peremptory challenge constitutes a violation of the constitutional right to an impartial jury." *Id.* at 88.

Problem: Do you preserve a claim that the trial court erred in denying a strike for cause, if you use a preemptory challenge to remove that juror?

Voir Dire

Federal:

"[A] specific objection or request during the voir dire process is required to preserve the objection for appeal." *U.S. v. LaRouche*, 896 F.2d 815, 829 (4th Cir. 1990); *accord Kloss v. U.S.*, 77 F.2d 462, 463 (8th Cir. 1935).

In federal criminal trials, erroneous denial of a strike for cause that results in use of a peremptory is not reversible error. *U.S. v. Martinez-Salazar*, 528 U.S. 304 (2000) ("a defendant's exercise of peremptory challenges pursuant to [Fed. R. Crim. P.] 24(b) is not denied or impaired when the defendant chooses to use a peremptory challenge to remove a juror who should have been excused for cause.").

Voir Dire

Federal:

However, in federal civil trials, peremptory challenges are protected by statute, and circuits are split over whether erroneous denial of a strike for cause that results in use of a peremptory challenge constitutes reversible error. 28 U.S.C. § 1870

Getter v. Wal-Mart Stores, Inc., 66 F.3d 1119, 1122-23 (10th Cir. 1995) (where party used peremptory to remove juror who should have been removed for cause, “the error was harmless”).

Kirk v. Raymark Indus., Inc., 61 F.3d 147, 157 (3d Cir. 1995) (“denial or impairment of a peremptory strike [under 28 U.S.C. § 1870] requires per se reversal”).

Objection to Introduction of Evidence

Missouri:

"Failure to object to the introduction of evidence at a trial preserves nothing for review." *Martens v. White*, 195 S.W.3d 548, 558 (Mo. Ct. App. 2006). It is insufficient to merely state "objection" without also stating "the legal or factual basis for the objection." *Henderson v. Fields*, 68 S.W.3d 455, 470 (Mo. Ct. App. 2001).

Federal:

"Error may not be predicated upon a ruling which admits… evidence unless… a timely objection or motion to strike appears of record, stating the specific ground of objection, if the specific ground was not apparent from the context." Fed. R. Evid. 103(a).

Improper Evidence

Problem: When is a curative instruction insufficient, so that a mistrial is the only appropriate remedy?

Stewart v. U.S., 366 U.S. 1 (1961):

- Stewart was tried three times for felony murder. The first two convictions were set aside because of (1) improper jury instruction on insanity defense, and (2) improper argument by the prosecutor.
- Stewart did not testify at the first two trials, but testified at the third in an effort to persuade the jury of his insanity defense.
- On cross-examination of Stewart, the prosecutor said, "Willie, you were tried on two other occasions…. This is the first time you have gone on the stand, isn't it, Willie?"

- Defense moved immediately for mistrial, which the trial court denied.
- Prosecution argues on appeal that mistrial is improper because the defense made no request for cautionary instructions.

Stewart v. U.S.

Held:

"[T]he danger of the situation would have been increased by a cautionary instruction in that such [an] instruction wouldhave again brought the jury's attention to petitioner's prior failures to testify. Plainly, the defense was under no obligation to take such a risk. The motion for a mistrial was entirely appropriate and, indeed, necessary to protect the interests of petitioner." 366 U.S. at 10.

Mistrial Problems:

1) Opponent violates in limine ruling
2) Injection of personal opinion
3) Offer of evidence withheld in discovery
4) Any difference between civil and criminal cases?

Introducing Evidence: Offer of Proof

Missouri:

"In order to preserve for appeal the issue of exclusion of evidence, offers of proof must be made at trial to show why the evidence is relevant and admissible." *JG St. Louis West Ltd. Liab. Co. v. City of Des Peres*, 41 S.W.3d 513, 519 (Mo. Ct. App. 2001).

The offer of proof "preserve[s] the record for appeal so the appellate court understands the scope and effect of the questions and proposed answers in considering whether the trial judge's ruling was proper." *Evans v. Wal-Mart Stores, Inc.*, 976 S.W.2d 582, 584 (Mo. Ct. App. 1998).

Where evidence is excluded for failure to lay a proper foundation, and the proper foundation is later laid, the proponent of the evidence must again seek to introduce the evidence after the foundation has been laid. *Midwest Materials Co. v. Village Dev. Co.*, 806 S.W.2d 477, 497 (Mo. Ct. App. 1991).

Introducing Evidence: Offer of Proof

Federal:

"One of the most fundamental principles in the law of evidence is that in order to challenge a trial court's exclusion of evidence, an attorney must preserve the issue for appeal by making an offer of proof." *Cross v. Cleaver*, 142 F.3d 1059, 1067 (8th Cir. 1998); *accord* Fed. R. Evid. 103(a).

Introducing Evidence: Offer of Proof

Problem: Is an offer of proof required where the evidence in question has been excluded by a pretrial ruling on a motion in limine?

U.S. v. Graves, 5 F.3d 1546 (5th Cir. 1993):

- Tax conspiracy charges against La. Sec'y of Transp. & Dev. Robert Graves.
- Creates phony documents of a real estate sale to conceal the source of other payments he received from the IRS.
- Counter-party on the phony real estate deal is arrested on drug charges and makes plan agreement to cooperate against Sec'y Graves.
- Plan agreement requires witness to take polygraph examination, but this was not done.
- Gov't files successful motion in limine to redact the polygraph clause from the plan agreement.
- Graves opposes motion, arguing it would be contrary to confrontation rights and credibility issue for cross-examination.
- Redacted plan agreement was admitted at trial.
- Graves does not make offer of proof on the polygraph clause, or object again to the redaction.

U.S. v. Graves

The Fifth Circuit said, “We will assume that the district court erred in permitting the clause to be redacted.”

Are the issues of confrontation and limits on cross-examination preserved for appeal?

U.S. v. Graves

"The rationale for requiring either a renewed objection, or an offer of proof, is to allow the trial judge to reconsider his in limine ruling with the benefit of having been witness to the unfolding events at trial….

Because Graves failed at trial to renew his objection (or offer the polygraph clause), we apply the plain error standard of review." 5 F.3d at 1552.

Introducing Evidence: Offer of Proof

Another problem:

Can a pretrial disclosure of expert witness materials constitute an offer of proof where the expert is excluded at trial?

Ponter-Cooper v. Dalkon Shield Claimants Trust, 49 F.3d 1285 (8th Cir. 1995):

- Dalkon Shield product liability personal injury case.
- Trust defendant follow A.H. Robins bankruptcy.
- Only issues are causation and actual damages.
- District Court excludes plaintiff's two experts.
- Jury verdict for plaintiff for $20,000.
- Plaintiff appeals.

- Expert #1: on causation
- Held: Harmless error in view of verdict

- Expert #2: on causation and damages
- Pretrial Disclosure: "Dr. Sweet 'may testify concerning the cause and effect of plaintiff's [pelvic inflammatory disease] in 1971 and her [pelvic inflammatory disease] in 1976." 49 F.3d at 1287.

Is that an adequate offer of proof to preserve the damages issue for appellate review?

Ponter-Cooper v. Dalkon Shield Claimants Trust

Held:

"Such a statement is not an adequate offer of proof…. Instead, the offer must express precisely the substance of the excluded evidence, which counsel accomplishes by stating with specificity what he or she anticipates will be the witness' testimony or by putting the witness on the stand."
48 F.3d at 1287 (internal quotation marks omitted).

Form of the Offer of Proof

1) Counsel proffer/sidebar
2) Written submission
3) “Consistent with deposition…”: Offer transcript and documents
4) Put the witness on the stand, with documents (jury excused)

Closing Argument

Missouri:

"Failure to object at trial to alleged improper argument preserves nothing for review on appeal." *Letz v. Turbomeca Engine Corp.*, 975 S.W.2d 155, 171 (Mo. Ct. App. 1997). Failure to state the basis for the objection preserves nothing for appellate review. *Gilmore v. Union Const. Co.*, 439 S.W.2d 763, 767 (Mo. 1969).

Federal:

"Failure to object to remarks made in argument generally constitutes waiver of the possible prejudicial effect of such remarks." *Potter v. St. Louis-San Francisco Ry. Co.*, 622 F.2d 979, 984 (8th Cir. 1980).

But is it rude, improper, or tactically unwise to interrupt opposing counsel?

Closing Argument

Examples:

Hofer v. Mack Trucks, Inc., 981 F.2d 377 (8th Cir. 1992):

Mack Truck's counsel's closing argument "was punctuated by unwarranted denunciations of Hofer's counsel, designed to inflame the jury against Hofer, his case, and his counsel…. We take particular note that, with one specific exception, Hofer's counsel failed to object to the closing arguments made by Mack's counsel…. In the very least, Hofer should have requested some curative or remedial action by the court before the case was submitted to the jury." 981 F.2d at 385.

U.S. v. Miller, 974 F.2d 953 (8th Cir. 1992):

Prosecutor stated in closing argument, "We can't force these people [the defendants] to take the stand. We can't torture them. That's unconstitutional."

Defense counsel did not object. Held: "The trial court had no opportunity to consider whether the remark was improper and, if so, whether the error could be cured by a cautionary instruction…. Although we think the remark was ill advised, we conclude that the district court did not commit plain error in failing *sua sponte* to declare a mistrial." 974 F.2d at 961.

Jury Instructions

Missouri:

"No party may assign as error the giving or failure to give instructions unless that party objects thereto before the jury retires to consider its verdict, stating distinctly the matter objected to and the grounds of the objection." Rule 70.03; *accord* Rule 28.03. "Where an alleged error relating to an instruction differs from the objections made to the trial court, the error may not be reviewed on appeal." *Seidel v. Gordon A. Grundaker Real Estate Co.*, 904 S.W.2d 357, 364 (Mo. Ct. App. 1995).

Jury Instructions

Federal:

"No party may assign as error the giving or failure to give an instruction unless that party objects thereto before the jury retires to consider its verdict, stating distinctly the matter objected to and the grounds for objection." Fed. R. Civ. P. 51. Verdict forms are treated like jury instructions, for purposes of preservation for appeal.

Angarita v. St. Louis County, 981 F.2d 1537, 1547 (8th Cir. 1992):

"[E]ven though appellants objected at trial to an instruction, that party may not complain on appeal that an instruction is misleading and ambiguous if an alternative instruction has not been offered at trial."

Four Step Process for Instructions

1) Submit proposed instruction on every anticipated issue before the close of the evidence (or as directed by the Court). Once evidence is closed, only submit on issues "not reasonably anticipated."
2) Object and make record on improper instructions, preferably in writing. If changes are made in conference, make new record. Objections must be specific. Make a record on instructions the court has refused, and be sure those submissions are on record.
3) Submit alternative instructions to the ones subject to objection. Include these in the record.
4) Final objections on the record after the Court has settled the instructions. Record must contain all refused instructions.

Missouri: Verdict Form

Missouri has different timing requirements for challenges to verdict forms, depending on whether the case is civil or criminal. In Missouri civil trials, "an objection to a verdict form must be raised either at the instruction conference or when the verdict is returned by the jury before it is accepted by the court." *Kansas City Power & Light Co. v. Bibb & Assoc., Inc.*, 197 S.W.3d 147, 157 (Mo. Ct. App. 2006).

However, in Missouri state criminal trials, the objection to a verdict form must be raised before the jury retires. Rule 28.03.

Kansas City Power & Light Co. v. Bibb & Assoc., Inc.

1) Two theories of liability: negligent design of the Burner Mgmt. System, and strict product liability based on defective “Trouble-Shooter” guide for the programmable logic controller component.
2) Affirmative defense of “contractual damages limitation” applies only to the negligence claim.
3) Both theories of liability are submitted to the jury. Jury returns verdict for KCPL--$452,000,000. Reduced to $98,000,000 based on prior settlements and comparative fault.
4) Defendant had moved for summary judgment based on affirmative defense. No objection to general verdict form. No submission of special interrogatories. No jury poll. No submission of alternative verdict forms.
5) Trial court enters judgment n.o.v. based on the affirmative defense, and reduces award to $190,000.

Was the affirmative defense properly preserved?

Kansas City Power & Light Co. v. Bibb & Assoc., Inc.

Held:

"Application of the contractual provision to limit Rockwell's liability was Rockwell's affirmative defense. Rockwell bore the burden of prosecuting the defense. Specifically, Rockwell bore the burden of ensuring that the basis of the jury's verdict was known so that the contractual provision could be applied to the appropriate claims. Yet, Rockwell failed to object to the general verdict form either before it was submitted to the jury or after it was returned by the jury….

Rockwell's failure to take any action to determine the basis of its liability under the general verdict resulted in abandonment of its affirmative defense….

A new trial is not required. Instead, the appropriate remedy is reversal with directions to enter judgment in accordance with the jury's verdict."

Missouri: Motions for Directed Verdict and JNOV

"To preserve the question of submissibility for appellate review in a jury-tried case, a motion for directed verdict must be filed at the close of all the evidence and, in the event of an adverse verdict, an after trial motion for a new trial or to set aside a verdict must assign as error the trial court's failure to have directed such a verdict. Failure to move for a directed verdict at the close of all the evidence waives any contention that plaintiff failed to prove a submissible case." *Gill Const. v. 18th & Vine Auth.*, 157 S.W.3d 699, 721 (Mo. Ct. App. 2004).

"A motion for judgment notwithstanding the verdict is a motion to have judgment entered in accordance with the motion for a directed verdict. Therefore a sufficient motion for a directed verdict is required to preserve the motion for judgment notwithstanding the verdict and for appeal." *Gill Const.*, 157 S.W.3d at 722 (internal quotation marks omitted).

Federal: Judgment as a Matter of Law

Federal Rule of Civil Procedure 50(a) allows entry of judgment as a matter of law at the close of a party's evidence. Rule 50(b) provides for a renewed motion for JAML after entry of judgment only if a Rule 50(a) motion has been filed.

"Where an appellant fails to renew its motion for [judgment as a matter of law] after the verdict, [the appellate court] cannot test the sufficiency of the evidence to support the jury's verdict beyond application of the plain error doctrine." *Cross v. Cleaver*, 142 F.3d 1059, 1070 (8th Cir. 1998) (internal quotation marks omitted).

See Unitherm Foods Sys., Inc. v. Swift-Eckrich, Inc., 126 S.Ct. 980 (2006) (failure to file Rule 50(b) motion waives any contention that evidence was insufficient as a matter of law).

Note: The 2006 amendment makes third motion optional, but still better practice to file it. *See* Rule 50(b), Advisory Committee Note to 2006 Amendment ("Rule 50(b) is amended to permit renewal of *any* Rule 50(a) motion… deleting the requirement that a motion be made at the close of all the evidence.").

Motion for New Trial

Missouri:

"In jury tried cases, except as otherwise provided… allegations of error must be included in a motion for a new trial in order to be preserved for appellate review." Rule 78.07(a).

The exceptions provided in Rule 78.07(a) include challenges to subject matter jurisdiction, sufficiency of the pleadings to state a claim or defense, issues presented in motions for JNOV, and issues on which a directed verdict is granted at trial.

In cases tried without a jury, a motion for a new trial is not necessary to preserve issues for appeal. Rule 78.07(b).

"In all cases, allegations of error relating to the form or language of the judgment, including the failure to make statutorily required findings, must be raised in a motion to amend the judgment in order to be preserved for appellate review." Rule 78.07(c).

Motion for New Trial

Federal:

"[T]he adequacy of a jury verdict must… be presented to the trial court in a motion for a new trial in order to preserve the issue for review." *Westcott v. Crinklaw*, 133 F.3d 658, 662 (8th Cir. 1998).

The motion for new trial, however, need not restate objections at trial in order to preserve appellate review. *Elmore v. U.S.*, 843 F.2d 1128, 1131 n. 7 (8th Cir. 1988) ("a motion for a new trial is not a prerequisite to a ground raised in a timely direct appeal").

Better practice is to file the motion if there is any possibility of seeking new trial relief in the court of appeals.

Problem

Parts & Elec. Motors, Inc. v. Sterling Electric, Inc., 826 F.2d 712 (7th Cir. 1987):

- P&E is a distributor of electric motors and parts.
- Sterling is supplier who cut P&E off of both motors and parts because P&E was not selling a sufficient quantity of electric motors.
- P&E sues, alleging Sherman Act § 1 "tying" violation.
- Jury verdict for P&E for $3.7 million.
- District Court grants JNOV and conditional grant of new trial.
- P&E appeals.

Issue on appeal: Was P&E required to prove the likelihood or danger of Sterling obtaining "market power" over electric motors (the "tied product") as an element of the tying claim?

3 defense motions for directed verdict raise the following issues:

1) No evidence shows that there was any effect in the tied market.
2) Defendant's program was pro-competitive
3) The evidence shows only a manufacturer with minimal market share seeking to improve competitive position of its product.

Parts & Elec. Motors, Inc. v. Sterling Electric, Inc.,

Instruction:

Market power with respect to the tied product, which is electric motors, is not relevant.

Objection:

Defendant objects that this is an improper definition of market power because it contains no consideration of profit.

Instruction tendered by defense, rejected by court:

Plaintiff must prove that the "tying" product has sufficient economic power or significant market leverage in the market for replacement parts… to appreciably restrain or foreclose the competition in the market for the "tied" product.

Rule 50(b) Motion argues:

Even if the Sterling distribution program were a tying arrangment, P&E has failed to demonstrate the requisite anti-competitive impact on the relevant market.

Has the issue of market power in the tied product been preserved?

Parts & Elec. Motors, Inc. v. Sterling Electric, Inc.,

Held:

"To preserve the issue of market power in the new motor market for judgment n.o.v. purposes, Sterling would have had to identify the point distinctly and specifically in a motion for directed verdict….

It seems clear to us that the district court erred in holding that the point had been properly raised and preserved in this case….

The phrase 'effect in the tied market'… suggests an impact on the volume of business and does not raise an issue of market power. Similarly, mere mention of the terms 'pro-competitive'… and 'miniscule market share'… is not sufficiently specific to raise an issue of market power in the tied product market. The requirement that the directed verdict motion raise each contested issue in specific terms… affords the nonmoving party an opportunity to repair the deficiencies in its case."

826 F.2d at 716.

Appellate Briefs

Missouri:

Rule 84.04 dictates the contents of an appellate brief. Rule 84.13(a) provides, "allegations of error not briefed or not properly briefed shall not be considered." The Missouri Court of Appeals has held, "The failure to substantially comply with Rule 84.04 preserves nothing for review." *Salmons v. Rich*, 206 S.W.3d 353, 354 (Mo. Ct. App. 2006).

Additionally, raising an issue in the appellant's reply brief but not the opening brief preserves nothing for review. *Collins v. Hertenstein*, 90 S.W.3d 87, 100 (Mo. Ct. App. 2002).

Federal:

Federal courts of appeal may dismiss an appeal for violation of the briefing requirements, although dismissal is not couched in terms of failing to preserve issues for appeal. *See U.S. v. 339.77 Acres of Land, More or Less, in Johnson and Logan Counties, Ark.*, 420 F.2d 324, 325 (8th Cir. 1970).

Record on Appeal

Missouri:

Rule 81.12 requires that the record on appeal contain "all of the record, proceedings and evidence necessary to the determination of all questions to be presented… to the appellate court for decision." The appellate court may deny a point on appeal for failure to include relevant materials in the record. *Christian Health Care of Springfield West Park, Inc. v. Little*, 145 S.W.3d 44, 51 (Mo. Ct. App. 2004).

Federal:

An appellant fails to preserve an issue for appeal where the party fails to include in the appellate record those documents necessary to aid the appellate court's determination. *Stanback v. Best Diversified Prod., Inc.*, 180 F.3d 903, 911-12 (8th Cir. 1999).